

Briefing Paper for North Dakota Coyote Station Title V Permit Renewal

Background:

In an April 11, 2013 source determination, the North Dakota Department of Health (NDDH) previously determined that Coyote Station (CS) and Coyote Creek Mining Company (CCMC) should be considered two separate sources for permitting purposes, and in so doing concluded that the two entities “do not appear to be under common control.” During the public comment period for the recent renewal of CS’s title V permit in 2018, commenters (the Voigts, via their attorney, JJ England) challenged aspects of this prior determination¹ (including aspects related to control) and asserted that CS and CCMC should be considered a single stationary source.² Both CS (through its majority owner, Otter Tail Power Company) and CCMC submitted comments in response, asserting that the two entities were not under common control, in part based on an analysis of “control” under the framework recommended by the EPA in its April 30, 2018 Meadowbrook Letter (*Meadowbrook*).³ In the NDDH’s October 2, 2018 letter to the EPA, the state asserted—also based on its understanding and application of the principles outlined in *Meadowbrook*—that “it is apparent to the Department that the CCMC mine and the Coyote Station are not under ‘common control’ as the owners of the Coyote Station do not have authority to dictate decisions that could affect the applicability of, or compliance with, relevant air pollution regulatory requirements for the CCMC mine.” For support, NDDH provided one example stating that, “the CCMC mine is subject to a fugitive dust control plan and it is the sole responsibility of CCMC to demonstrate compliance with the plan.” NDDH requested the EPA’s position on this matter as part of the EPA’s review of the CS title V renewal permit.

EPA responded with a letter to NDDH sent November 14, 2018, informing NDDH that EPA believes that NDDH did not adequately discuss concerns stemming from the Lignite Sales Contract between Coyote Station and Coyote Creek Mine. Language therein seems to qualify under *Meadowbrook* as giving CS control over CCMC, and EPA urged NDDH to take a closer look at the contract terms in developing their source determination.

On February 14, 2019, EPA and NDDH staff and management had a call to clarify the contents of EPA’s November 14 letter and discuss what issues NDDH would need to focus on in order to improve their source determination. On February 15, 2019, NDDH provided EPA with a second draft source determination that they hoped addressed the concerns raised by the public commenters and by EPA in our response letter. EPA staff discussed this draft over the phone with NDDH and gave initial feedback. NDDH then sent a third draft on March 21, 2019, which EPA again responded to over the phone. EPA’s feedback focused on getting NDDH to reconcile

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³ Letter from William L. Wehrum, Assistant Administrator, Office of Air and Radiation, EPA, to the Honorable Patrick McDonnell, Secretary, Pennsylvania Department of Environmental Protection (April 30, 2018), available at https://www.epa.gov/sites/production/files/2018-05/documents/meadowbrook_2018.pdf (“Meadowbrook Letter”).

the apparent control established by the language in the Lignite Sales Contract. *Meadowbrook* defines control as, “the power or authority of one entity to dictate decisions of the other that could affect the **applicability** of, or **compliance** with, relevant air pollution regulatory requirements” (emphasis added).

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On June 25th, 2019 NDDH provided a fourth draft of their source determination, along with the first draft of their response to comments for the CS title V permit.

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Source determination:

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- 1) NDDH argues: “However, the CS station cannot simply demand more coal than the 3.2 million ton annual restriction and potentially force the CCMC into additional applicable air pollution requirements given that the amount of coal mined at CCMC is restricted by legally enforceable PTC/PTO conditions. Department review and approval is necessary to increase the maximum amount of coal mined, so the amount of coal mined (and associated air pollution requirements) is governed by the Department’s permitting process and not by the CS station.” Page 3.

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Response to Comments:

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Petition History:

On January 15, 2019 EPA received a petition to object to the Coyote Station title V permit by Casey and Julie Voigt (submitted by their attorney, JJ England).

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NDDH sent a letter to EPA on March 13, 2019 stating they were withdrawing the current permit in order to complete the permit record. NDDH stated in this letter that if any significant changes were made to the draft permit they would restart the title V review process, including 30-day public comment period and 45-day EPA review. If no significant changes are made NDDH will re-issue the permit for EPA 45-day review.

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Furthermore, on June 26, 2019 EPA received a Freedom of Information Act request from the Voigts' attorney concerning Coyote Station.

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